Supreme Court, U. S.
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in the

Supreme Court

of the

United States

OCTOBER TERM, 1978

NO. 78-228

FLORIDA EAST COAST PROPERTIES, INC.,
Petitioner

v.

METROPOLITAN DADE COUNTY,
Respondent

APPENDIX TO PETITION FOR WRIT OF CERTIORARI

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INDEX

	Page
United States Constitution, Amendment V	1
United States Constitution, Amendment XIV Section I	1
Findings of Fact and Conclusions of Law of United States District Judge C. Clyde Atkins	2
Final Judgment for Defendant, Metropolitan Dade County	6
Decision of United States Court of Appeals, Fifth Circuit	7

UNITED STATES CONSTITUTION, AMENDMENT V

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

UNITED STATES CONSTITUTION, AMENDMENT XIV, SECTION I

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

NO. 74-1569-Civ-CA

FLORIDA EAST COAST PROPERTIES, INC.
Plaintiff

V

METROPOLITAN DADE COUNTY
Defendant

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This cause was tried before the Court without a jury. Plaintiff presented claims under the Fifth and Fourteenth Amendments for inverse condemnation and under State law for nuisance. Defendant's affirmative defenses included the doctrine of res adjudicata, virtual representation, abstention, lack of a substantial federal claim and lack of jurisdiction. Based upon the evidence adduced in this cause and argument of counsel the Court makes the following Findings of Fact and Conclusions of Law.

FINDINGS OF FACT

1. Plaintiff, Florida East Coast Properties, Inc., is a corporation incorporated under the laws of the State of Florida, having its principal business in Dade County, Florida.

2. Defendant, Metropolitan Dade County, is a political subdivision of the State of Florida.

3. The plaintiff is the owner of certain real property located in Dade County, Floria, [sic] as more particularly described in Exhibit "A" to the complaint.

4. The defendant owns or has a legal controlling interest in that property located east of State Road 9, north of the Biscayne Drainage Canal and Northwest of Seventh Avenue, Dade County, Florida.

5. The aforesaid properties owned by plaintiff abut on, are next to or are at the closest point with approximately 250 feet of the aforesaid property owned or legally controlled by the defendant.

6. The plaintiff's aforesaid property is, and at all times material to this cause, has been zoned by the defendant as a RU-4 multiple family residential area.

7. The defendant's aforementioned property and the property immediately to the north and east of defendant's said property is and at all times material to this cause has been zoned by the defendant as a GU interim use zone.

8. The property immediately to the south of plaintiff's said property is and at all times material to this cause has been zoned by the Defendant as a RU1 single family residential zone.

9. The defendant developed its aforesaid property as a jail and work-release facility for the purpose of holding and incarcerating persons charged with crimes and felonies and persons already convicted of crimes and felonies. The

defendant began the operation of this facility on September 17, 1974, and is currently operating it as such.

10. The defendant erected a jail work-release facility on the site of its aforesaid property, the major portion of which constitutes a peninsula in a lake.

11. The jail work-release facility property called the North Dade Detention and Treatment Facility, began operation in September, 1974 and has constantly been in operation since that time.

12. Plaintiff's property abuts on the lake in which the peninsula where the North Dade Detention and Treatment Facility was erected and is in operation.

13. The North Dade Detention and Treatment Facility is surrounded on three sides by water and on the other side by a limited access road.

14. There is no fence around the North Dade Detention and Treatment Facility and nothing else about the appearance of the facility to indicate its use as a jail or detention center.

15. Plaintiff has shown no physical invasion of its property, no physical injury to such property, nor any other effect that amounts to a taking in the Constitutional sense, as a result of defendant's actions.

16. Plaintiffs [sic] have [sic] shown no factual basis such as would support a finding that the North Dade Detention and Treatment Facility constitutes a nuisance.

CONCLUSIONS OF LAW

1. Jails and/or work release facilities are not nuisances per se. *See Pharr v. Garibaldi*, 252 NE 803, 114 S.E.2d 18 (196)[sic]; *West Shore School Dist. Commonwealth*, 325 A.2d 669 (Pa. Cmwlth. 1974); *Nicholson v. Connecticut Half-Way House, Inc.*, 153 Conn. 507, 218 A.2d 383 (1966); *Annotation, Nuisances — Institutions For Criminals*, 21 A.L.R. 3d 1058, and cases cited therein.

2. North Dade Detention and Treatment Facility is not a nuisance in fact.

3. Plaintiff has not been deprived of his [sic] property in violation of the Fifth and Fourteenth Amendments as there has been no taking in the Constitutional sense.

4. The Court determines that the plaintiff's other claims under the Fifth and Fourteenth Amendments are without merit.

The Clerk will enter judgment for the defendant pursuant to Federal Rule of Civil Procedure 58.

THIS 27th day of February, 1976.

/S/ C. Clyde Atkins
United States District Judge

cc. Frates Floyd et al.
Office of the County Attorney (Stephen Lee, Esq.)

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

NO. 74-1569-Civ-CA

FLORIDA EAST COAST PROPERTIES, INC.
Plaintiff

v

METROPOLITAN DADE COUNTY
Defendant

FINAL JUDGMENT

THIS ACTION came on for trial before the Court, Honorable C. Clyde Atkins, District Judge, presiding, and the issues having been duly tried and a decision having been duly rendered, it is

ORDERED AND ADJUDGED that the plaintiff, Florida East Coast Properties, Inc., take nothing, that the action be dismissed on the merits, and that the defendant, Metropolitan Dade County, recover of the plaintiff its costs of action.

DATED at Miami, Florida this 27 day of February, 1976.

JOSEPH I. BOGART,
Clerk of Court

/S/ Rose I. Greene
Rose I. Greene, Deputy Clerk

FLORIDA EAST COAST PROPERTIES, INC.,
a Florida Corporation,
Plaintiff-Appellant,

v.

METROPOLITAN DADE COUNTY,
a Political Subdivision of the State of Florida,
Defendant-Appellee.

No. 76-2065.

United States Court of Appeals,
Fifth Circuit.

May 12, 1978.

Property owner brought action against county challenging the construction of a jail/work-release facility on land adjacent to plaintiff's residential property. The United States District Court for the Southern District of Florida, C. Clyde Atkins, Chief Judge, entered judgment for county, and property owner appealed. The Court of Appeals, Lynne, Senior District Judge, held that: (1) evidence sustained finding that construction of jail/work-release facility on land adjacent to plaintiffs residential property did not constitute a "taking" without just compensation, and (2) evidence sustained finding that jail/work-release facility did not constitute a nuisance in fact.

Affirmed.

1. Eminent Domain — 2(1)

There is a well-recognized distinction between damage and taking, and that distinction must be observed in applying constitutional provision prohibiting the taking of private property without just compensation; the essential inquiry is whether injury to private property owner is merely in nature of a tortious invasion of his property rights or rises to the magnitude of an appropriation of some interest in his property. U.S.C.A. Const. Amends. 5, 14.

2. Eminent Domain — 2(1)

What constitutes a "taking" of private property is not susceptible of facile definition, but it is the character of the invasion, not the amount of damage which results from it which determines the question of whether there has been a taking.

3. Eminent Domain — 2(1)

Concept of condemnation is so firmly wedded to property rights that a taking is to be found only where inroads are made upon owner's use of his property to an extent that some type of servitude may be acquired by the government.

4. Eminent Domain — 270

In quest to receive compensation for alleged taking, an action in nature of inverse condemnation may be initiated by private landowner where government has not directly proceeded to appropriate title or possession of

property but has destroyed its actual usefulness and value by reason of de facto exercise of power of eminent domain.

5. Eminent Domain — 2(1)

It is the adverse appropriation or use of some private property right by government, as opposed to an incidental consequence arising from government's use of its own property, which leaves the realm of tortious invasion and rises to constitutional level of taking private property.

6. Eminent Domain — 2(1)

The sine qua non of a constitutional taking is a loss occasioned by intrusion, interference or encroachment of some degree upon private property owner's rights in his property; consequential damages or losses are not enough.

7. Eminent Domain — 2(1)

Construction of a jail/work-release facility on land adjacent to plaintiffs' residential property did not constitute a "taking" without just compensation. U.S.C.A. Const. Amends. 5, 14.

See publication Words and Phrases for other judicial constructions and definitions.

8. Nuisance — 4, 6

Before a thing becomes a nuisance per se at common law, it must be either unlawful in itself or of such inherent qualities that its natural tendency, wherever located, is to produce injury.

9. Nuisance — 3(1)

A jail/work-release facility is not of such an inherently dangerous character as to make it a nuisance per se.

10. Nuisance — 1

Under Florida law, a "nuisance" is anything which annoys or disturbs one in the free use, possession or enjoyment of his property, or which renders its ordinary use of occupation physically uncomfortable.

See publication Words and Phrases for other judicial constructions and definitions.

11. Nuisance — 25(1)

In determining whether a thing is a nuisance, court must make comparative evaluation of conflicting interests according to objective legal standards, and gravity of harm to plaintiff must be weighed against utility of defendant's conduct.

12. Nuisance — 33

Evidence in action challenging the construction of a jail/work-release facility on land adjacent to plaintiff's residential property sustained finding that jail/work-release facility did not constitute a nuisance in fact.

Appeal from the United States District Court for the Southern District of Florida.

Before CLARK and GEE, Circuit Judges, and LYNNE, Senior District Judge*.

LYNNE, District Judge:

This is an appeal from a final judgment entered by the district court after a bench trial. The plaintiff-appellant, Florida East Coast Properties, Inc. (FECP), owns some thirty-six acres of land located in Metropolitan Dade County, Florida, which it purchased in early 1973 for condominium construction and development. This land was and remains zoned as a multiple family residential area. The southern boundary of FECP's land is adjacent to a parcel of land, consisting of some twenty acres, owned by defendant-appellee Metropolitan Dade County (County), a political subdivision of the State of Florida. The County's land forms a small peninsula surrounded by a lake on three sides and a highway on the other. It is contiguous to FECP's property at one point and is separated by as little as two hundred and fifty feet of water at another. In late 1973 the County began construction of the North Dade Detention and Treatment Center on this

*Senior District Judge of the Northern District of Alabama, sitting by designation.

peninsula.[1] The Center was completed and placed in operation on September 17, 1974, as a combination jail and work release facility which houses persons who have been either charged with or convicted of crimes. The location of this facility is the focal point of this litigation, commenced shortly after its completion.

The court below held against appellant on each of its several contentions: (1) that the erection of the jail/work-release facility adjacent to plaintiff's residential property had caused an extreme diminution in the market value of

[1]An action was instituted to enjoin this construction as being contrary to the zoning classification of the County's property. While several hearings on the proposed construction had been held, the County conceded that it erected this facility in an "Interim Use" zone without taking any action to change that classification and that such a jail/work release facility was not otherwise provided for in an "Interim Use" zone. The County maintained (and continues to urge) that it was not bound by its own zoning ordinances at the relevant time. A temporary injunction was issued against further construction by a state trial court on June 25, 1973. That order was reversed by the Florida Court of Appeals in *Metropolitan Dade County v. Parkway Towers Condominium Assoc.*, 281 So.2d 68 (Fla.App.1973). The Florida Supreme Court granted certiorari, heard oral argument and considered briefs on the zoning issue, but later discharged the writ. In discharging the writ, the court expressed the "view prospectively" that municipalities ought to comply with or properly alter their own zoning ordinances in efforts to accomplish goals such as the construction of this facility. *Parkway Towers Condominium Assoc. v. Metropolitan Dade County*, 295 So.2d 295 (Fla.1974).

FECP has attempted to have this prospective observation by the Florida Supreme Court shape the character of this action which was filed shortly thereafter. However, we decline to grant it the retrospective effect which the state courts have refused after extensive consideration in that system. *See Breland v. Rice*, 496 F.2d 89 (5th Cir.1974).

FECP's property and therefore constituted a taking without just compensation in violation of the Fifth and Fourteenth Amendments to the Constitution of the United States; (2) that the location of the jail/work-release facility results in the disturbance of use and enjoyment of FECP's property so as to constitute a nuisance; and (3) that the County had caused FECP to be taxed more heavily than other property owners as a result of the erection of this facility, thereby violating FECP's constitutional right to equal protection of the law. We affirm.

TAKING WITHOUT JUST COMPENSATION

We eschew any attempt to explore the esoteric question: can there be a taking without a touching? Rather, our review is confined to a narrow survey of the precise conclusion of the trial court that, on the evidence before it, there had been no taking in the constitutional sense.

At the trial the court received extensive photographic evidence and oral testimony relating to the character and appearance of the County's facility as well as expert appraisals of its impact upon the market value of the FECP property. FECP also introduced evidence in support of its insistence that it had lost two contracts for the sale of its land because of the proximity of the County's facility. A psychologist testified that people generally fear living near jails. However, there was no evidence of any physical intrusion[2] or encroachment upon FECP's

[2]There was some testimony to the effect that the County's facility had suffered some sixteen escape attempts prior to the trial and that one of these escapees may have traversed some portion of FECP's property before being apprehended.

property, or its use, except with respect to the claimed economic loss in value.

[1-4] The Constitution provides that private property shall not be taken without just compensation and thus a question "arising under" the Constitution is presented in this case. *Southpark Square Ltd. v. City of Jackson, Miss.*, 565 F.2d 338 (5th Cir. 1977). However, there is a well recognized distinction between damage and taking, and that distinction must be observed in applying the constitutional provisions here relied upon. *Bedford v. United States*, 192 U.S. 217, 224, 24 S.Ct. 238, 48 L.Ed. 414 (1904). The essential inquiry is whether the injury to the private property owner is merely in the nature of a tortious invasion of his property rights or rises to the magnitude of an appropriation of some interest in his property. In this regard, what constitutes a "taking" of private property is not susceptible of facile definition, but it is axiomatic that "it is the character of the invasion, not the amount of damage which results from it . . ." which determines the question of whether there has been a taking. *United States v. Cress*, 243 U.S. 316, 328, 37 S.Ct. 380, 385, 61 L.Ed. 746 (1917). Moreover, the concept of condemnation is so firmly wedded to property rights that a taking is to be found only where inroads are made upon an owner's use of his property to an extent that some type of servitude may be acquired by the government. *See United States v. Dickinson*, 331 U.S. 745, 748, 67 S.Ct. 1382, 91 L.Ed. 1789 (1947). In the quest to receive compensation for an alleged "taking," an action in the nature of inverse condemnation may be initiated by the private landowner where the government has not directly proceeded to appropriate title or possession of the property but has destroyed its actual usefulness and value by reason of the de facto exercise of the power of eminent domain.

Pumpelly v. Green Bay & Mississippi Canal Co., 80 U.S. 166, (13 Wall.), 20 L.Ed. 557 (1871); *Omnia Co. v. United States*, 261 U.S. 502, 505, 43 S.Ct. 437, 67 L.Ed. 773 (1923).

[5] In the case sub judice, FECP urges that the effect of the County's construction of this jail/work-release facility was to diminish the value of FECP's property to such an extreme degree as to constitute a taking in the constitutional sense. However, such a bare contention overlooks the basic concept that it is the adverse appropriation or use of some private property right by the government, as opposed to an incidental consequence arising from the government's use of its own property, which leaves the realm of tortious invasion and rises to the constitutional level of taking private property. In *Transportation Company v. Chicago*, 99 U.S. 635, 25 L.Ed. 336 (1878), Mr. Justice Strong, writing for the Court, stated:

> But acts done in the proper exercise of governmental powers, and not directly encroaching upon private property, though their consequences may impair its use, are universally held not to be a taking within the meaning of the constitutional provision. 99 U.S. at 642, 25 L.Ed. 336.

[6, 7] We have previously held that notwithstanding an effect upon property values by government action, there is no taking within the purview of the Fourteenth Amendment without some dimunution in the owner's rights of use in his property. *Chacon v. Granata*,

515 F.2d 922, 925 (5th Cir. 1975).[3] Thus the sine qua non of a constitutional taking is a loss occasioned by an intrusion, interference or encroachment of some degree upon the private property owner's rights in his property. Consequential damages or losses are not enough. *See United States v. Causby*, 328 U.S. 256, 265, 66 S.Ct. 1062, 90 L.Ed. 1206 (1946). While the character of the neighborhood may have been altered by the construction and operation of the County's facility, there has been no alteration or interference with FECP's property or property rights. Diminution in value alone is simply not sufficient to present a cognizable claim for compensation under the Fifth or Fourteenth Amendments.[4]

[3]That opinion cited *Woodland Market Realty Co. v. City of Cleveland*, 426 F.2d 955 (6th Cir. 1970), where the Sixth Circuit held that a decline in property values caused by a change in the neighborhood through urban renewal projects was not a taking. *See also Ortega Cabrera v. Municipality of Bayamon*, 562 F.2d 91 (1st Cir. 1977).

[4]The Kentucky Court of Appeals explained this principle of the insufficiency of consequential damages quite artfully when it stated:

> It is fundamental that a buyer of property assumes the risk of changing community conditions. Sometimes the value of his property is enhanced, and he does not have to pay for the enhancement. Sometimes it declines, and he has no recourse. These facts of life are not subject to an exception simply because the source of the transition can be identified and is suable. *Louisville and Jefferson County Air Board v. Porter, Kentucky*, 397 S.W.2d 146, at 152 (Ky.App. 1965).

In the instant case, there were no findings of fact made by the trial court as to whether FECP's property had actually declined in value and the issue was sharply disputed in the evidence.

NUISANCE

[8, 9] FECP has attempted to combine its hermaphroditic claim of "inverse condemnation via nuisance" with a pendent claim of common law nuisance. Since we decline herein to apply retrospectively the prospective admonition by the Florida Supreme Court that a municipality must obey its own zoning ordinances, the County's facility cannot constitute a nuisance per se. Generally, before a thing becomes a nuisance per se at common law, it must be either unlawful in itself or of such inherent qualities that its natural tendency, wherever located, is to produce injury. 58 Am. Jur.2d *Nuisances* §13. While a jail/work-release facility may be considered an unhappy addition to our environment, it is not of such an inherently dangerous character as to make it a nuisance per se. Rather, it is an unfortunate necessity which renders society safer by its presence (when properly maintained) than it would be in its absence.

[10] The issue of whether a jail/work-release facility may become a nuisance in fact, when not properly placed or maintained, has also been raised in this cause. Florida law defines a nuisance as anything which annoys or disturbs one in the free use, possession or enjoyment of his property, or which renders its ordinary use of occupation physically uncomfortable. *Jones v. Trawick*, 75 So.2d 785 (Fla.1954). While there may be some apprehension caused by the proximity of a detention facility to a residential area, that fact cannot be singularly determinative of the issue. *Cf. A&P Food Stores, Inc. v. Kornstein*, 121 So.2d 701 (Fla.App. 1960).

[11, 12] In every case, the court must make a comparative evaluation of the conflicting interests according to

objective legal standards, and the gravity of harm to the plaintiff must be weighed against the utility of the defendant's conduct. W. Prosser, *Law of Torts* §89 at 596 (4th ed. 1971). The trial court found that there was nothing about the appearance of the County's facility to indicate its use as a jail or detention center. The record also discloses that the facility was located between FECP's property and a large industrial park so that its location and architecture did not resemble a "pig in a parlor." Additionally, there was evidence of a telephone survey introduced at the trial which indicated that most of the residents in this area were unaware of the facility's true nature and found it quite attractive. The fact, standing alone, that FECP has suffered a decline in market value of its property has no more probative effect to establish nuisance than to prove a taking in the constitutional sense. Thus we cannot find that the trial court was clearly erroneous when it found that this facility did not constitute a nuisance.

EQUAL PROTECTION

Finally, with regard to FECP's contention that the County has violated FECP's constitutional rights to equal protection of the law by failing to reduce FECP's property taxes in accordance with the zoning aberration caused by the construction of the jail in a technically incompatible zone, it was disclosed by counsel for the County during oral argument that there has been a 15% tax reduction, ordered by a Special Master in 1974. Significantly, FECP adduced no persuasive evidence that its tax treatment differed from that of others similarly situated, the sine qua non for establishing an equal protection violation.

For the reasons discussed above the judgment of the district court is AFFIRMED.